APPENDIX A

HISTORIOGRAPHICAL NOTE

Amici offer this brief historiographical note in the hope that it will prove helpful to the Court in its own research.

The earliest general history that may prove useful is Martin Barr, *Mental Defectives: Their History, Treatment and Training* (1913). Barr was a fanatical alarmist by modern standards, having proposed a national segregating "reservation" (modelled after Indian reservations) and the castration and selective killing of retarded people at various points in his prominent career, which included the superintendency of the institution at Elwyn, Pennsylvania, and the presidency of AAMD. More dispassionate views can be obtained from Peter L. Tyor & Leland V. Bell, *Caring for the Retarded in America: A History* (1984); Leo Kanner, *A History of the Care and Study of the Mentally Retarded* (1964); and Richard Scheerenberger, *A History of Mental Retardation* (1983), the latter having also served as an institutional superintendent and president of AAMD. Professor Wolf Wolfensberger's *The Origin and Nature of Our Institutional Models* (1975), which can also be found as a chapter of the U.S. President's Committee on Mental Retardation's *Changing Patterns in Residential Services for the Mentally Retarded* (R. Kugel & A. Shearer eds., rev. ed. 1976), is particularly informative about the evolution of public attitudes toward retarded people and on the history of eugenic segregation, and is extraordinarily well documented.

Briefer historical accounts can be found in Stanley S. Herr, *Rights and Advocacy for Retarded People* 9-36 (1983); and Albert Deutsch, *The Mentally Ill in America* 332-86 (2d ed. 1949).

The history of the eugenics movement is well documented in K. Ludmerer, *Genetics and American Society* (1972); and Daniel Kevles, *Annals of Eugenics*, The New Yorker, Oct. 8, 15, 22, and 29, 1984.

A review of original sources from the alarmist period must begin with the work of the extremely influential Henry H. Goddard, a most prolific writer who also served as president of AAMD. Particularly relevant are his *Feeble-Mindedness: Its Causes and Consequences* (1914); and *The Criminal Imbecile: An Analysis of Three Remarkable Murder Cases* (1915). But his most influential work was certainly *The Kallikak Family* (1912), which purported to be the geneology of a family with retardation and vice on one side and uncorrupted virtue on the other, suggesting the inheritability of criminality and immorality and the need for eugenic sterilization and segregation legislation. Such pointed geneologies were a popular genre during this period; e.g., R. Dugdale's *"The Jukes": A Study in Crime, Pauperism, Disease and Heredity* (5th ed. 1895); and M. Kostir, *The Family of Sam Sixty* (1916) (the pseudonym drawn from his supposed IQ score). Generous reference to these geneologies is often found in state reports urging the creation or expansion of segregating institutions. Stephen Jay Gould has re-examined Goddard's Kallikak data and discovered that they were deliberately altered to support the author's preconceived conclusions. S. Gould, *The Mismeasure of Man* 171 (1981).

Other important works from this era included S. Davies, *Social Control of the Feebleminded* (1923); J. Landman, *Human Sterilization* (1932); Walter Fernald's *The Burden of Feeble-Mindedness*, 17 J. Psycho-Asthenics 87 (1912); and Fernald, *Thirty Years Progress in the Care of the Feebleminded*, 29 J. Psycho-Asthenics 206 (1924). Many key documents from this and other periods can be found in *The History of Mental Retarda-*

tion: Collected Papers (M. Rosen, G. Clark & M. Kivitz eds. 1976) (2 vols.).

The key professional journal for original sources from the eugenic period is the *American Journal on Mental Deficiency* (published earlier as the *Journal of Psycho-Asthenics*), the principal journal of AAMD. A useful guide to some of its most significant articles is William Sloan & Harvey Stevens, *A Century of Concern: A History of the American Association on Mental Deficiency, 1876-1976* (1976).

On the subject of treatment of retarded people in institutions and the community in the modern era, the best source is David and Sheila Rothman, *The Willowbrook Wars* (1984).

APPENDIX B

STATUTORY REFERENCES

This Appendix sets out some illustrative state laws in the areas of segregation,[1] marriage restrictions, and involuntary sterilization. While some of these statutes have recently been repealed, their longevity demonstrates the persistence of prejudicial stereotypes and discrimination.

A recently published collection of charts of modern state laws in these areas may be found in *Disabled Persons and the Law: State Legislative Issues* (B. Sales, et al., eds. 1982). A historical collection may be found in S. Smith, M. Wilkinson & L. Wagoner, *A Summary of the Laws of the Several States Governing I. Marriage and Divorce of the Feebleminded, the Epileptic and the Insane II. Asexualization III. Institutional Commitment and Discharge of the Feebleminded and the Epileptic* (1914).

Segregation

"Should the institution at any time not be able to accommodate all who should be admitted thereto under this Section, preference in admission shall be given to children and *women of child bearing age.*"[2] Enacted by Act of Sept. 12, 1969, No. 774, § 2, 1969 Ala. Acts 1384, 1385, *remains in effect*: Ala. Code § 22-52-51 (1984).

The Arkansas Mental Retardation Act, in its list of statutory definitions, defined "child" or "children" to mean "mentally deficient persons without regard to chronological age." Enacted by Act of Jan. 25, 1955, No. 6, § 1, 1955 Ark. Acts 11, repealed by Act of Feb. 3, 1983, No. 37, § 1, 1983 Ark. Acts 80, codified at Ark.

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[1] For a more complete history of the States' first actions in segregating people with mental retardation, see Appendix to the *Amici* brief of the Association for Retarded Citizens, et al.

[2] All italics supplied by *Amici*.

Stat. Ann. § 59-1002.1 (Supp. 1983). (General Assembly acknowledged such language to be "inappropriate and offensive.")

"In the case of adult *females between the ages of 16 and 45* years, any person may file . . . that she is idiotic or feebleminded . . . that she is a *menace to society* . . . ." Enacted by Act of Mar. 4, 1911, ch. 192, § 2, 1911 Ind. Acts 471, 471-72, repealed by Act of Mar. 9, 1939, ch. 119, § 6, 1939 Ind. Acts 578, 581.

"[N]o feebleminded female shall be mantained at the county poor farm. All care of such *feebleminded females* must secure their protection and *segregation.* It shall be the first duty of boards of supervisors in extending care and protection to feebleminded persons, to *prevent the propagation of the feebleminded.* Enacted by Act of Apr. 3, 1920, ch. 210, § 28, 1920 Miss. Laws 288, 300, *remains in effect* Miss. Code Ann. § 41-21-43 (1972). The statutory definition of "feebleminded" includes "constitute *menaces* to the happiness or safety of themselves or of other persons in the community . . . ." Enacted by Act of Apr. 3, 1920, ch. 210, § 2, 1920 Miss. Laws 288, 288, repealed by 1984 Miss. Laws ch. 472, § 3. "That the chancery courts have jurisdiction in all cases of legal inquiry in regard to feeblemindedness, including idiocy, imbecility, and the higher grades and varieties of mental inferiority which renders the subjects *unfit for citizenship.*" Enacted by Act of Apr. 3, 1920, ch. 210, § 17, 1920 Miss. Laws 288, 294.

"[A]ll feeble-minded persons . . . whose defects prevent them from properly taking care of themselves or who are a *social menace* may be admitted . . . ." Enacted by Act of Mar. 25, 1929, ch. 75, § 22, 1929 Utah Laws 102, 108, repealed by Act of Feb. 17, 1983, ch. 314, § 1, 1983 Utah Laws 1224.

Marriage Restrictions

"Any person who *aids or abets the marriage of any feeble-minded person,* or attempts to marry, or aid or

abet any attempted marriage with an idiot . . . shall be fined not less than fifty dollars nor more than five hundred dollars." Enacted by Act of Mar. 19, 1928, ch. 156, 1928 Ky. Acts 534, *remains in effect* Ky. Rev. Stat. Ann. § 402.990(2) (Baldwin 1984).

"No *woman under the age of forty-five* years, or a man of any age, except he marry a woman over the age of forty-five years, either of whom is . . . feebleminded . . . , shall hereafter intermarry or marry any other person within this state." Enacted by Act of Mar. 11, 1903, ch. 220, § 1, 1903 Kans. Sess. Laws 373, 373-74, repealed by Act of Apr. 7, 1977, ch. 123, § 1, 1977 Kan. Sess. Laws 529.

"Any person of sound mind who shall intermarry with such insane person or idiot or person who has been so confined as a feebleminded, imbecile or insane patient, or who has been so adjudged insane, feebleminded or an imbecile, . . . , or who shall advise, *aid*, *abet*, cause, procure or assist in procuring any such marriage . . . , is *guilty of a felony* and . . . shall be punished by a fine of not more than $1,000.00 or by imprisonment in the state prison not less than 1 year nor more than 5 years, or by both such fine and imprisonment." The 1905 amendment added the punishments by fine and/or imprisonment. Act of May 25, 1905, No. 136, § 1, 1905 Mich. Pub. Acts 185, 186, *remains in effect* Mich. Comp. Laws Ann. § 551.6 (West 1967). As originally enacted in 1846 Mich. Pub. Acts ch. 83, § 6, this section previously read: "No white person shall intermarry with a negro, and no insane person or idiot shall be capable of contracting marriage." Historical Note to § 551.6.

"It shall be unlawful for any person to cohabit with or attempt sexual intercourse with a female who is feebleminded . . . . Anyone convicted of either of these crimes, shall, upon conviction thereof, be punished by a *fine* of not less than one thousand dollars, or an *imprisonment* of not less than one year in the penitentiary, or by both

such fine and imprisonment." Enacted by Act of Apr. 3, 1920, ch. 210, § 29, 1920 Miss. Laws 288, 300, *remains in effect* with minor changes Miss. Code Ann. § 41-21-45 (1972).

"Marriages . . . between persons, either one of whom is feeble minded, are *incestuous and void* from the beginning . . . ." Enacted by Act of Feb. 11, 1919, ch. 6, § 1, 1919 Mont. Laws 15, repealed by Act of May 6, 1975, ch. 536, § 45, 1975 Mont. Laws 1514, 1533.

"No person who has been adjudged an imbecile, or a feebleminded person . . . shall marry in this state, *until after he or she has submitted to an operation for sterilization.*" Enacted by Act of Apr. 26, 1923, ch. 40, § 1, 1923 Neb. Laws 154, repealed by Act of May 7, 1971, LB728, § 1, 1971 Neb. Laws LB728, 1.

"No woman under the age of forty-five years, or man of any age, except he marry a woman over the age of forty-five years, either of whom is a common drunkard, habitual criminal, imbecile, feeble minded person, idiot or insane person, or person who has theretofore been afflicted with hereditary insanity, or who is afflicted with pulmonary tuberculosis in its advanced stages, or any contagious venereal disease, shall hereafter intermarry or marry any other person within this state." Enacted by Act of Mar. 17, 1909, ch. 174, § 1, 1909 Wash. Laws 633, 633-34. Amended to exclude age limitation but adding "*unless it is established that procreation is not possible* by the couple intending to marry." Act of Apr. 24, 1973, ch. 154, § 27, 1973 Wash. Laws 1st Ex. Sess. 1118, 1134-35, repealed by Act of May 4, 1979, ch. 128, § 4, 1979 Wash. Laws, 1st Ex. Sess. 1396, 1397-98.

"[A]ny marriage where either of the parties thereto is an idiot or a lunatic at the time of such marriage, shall be absolutely void, and *no life estate* . . . shall be assigned to any widow . . . and *the issue of such marriage*

shall be deemed illegitimate and subject to all the disabilities of such issue." Enacted by 1896 R.I. Pub. Laws ch. 191, § 5, *remains in effect* with minor changes R.I. Gen. Laws § 15-1-5 (1956).

Involuntary Sterilization

A petition for the sterilization of any mentally retarded person living in an institution may be made when "considered in the best interest of the mental, moral, or physical improvement of the resident or patient, or *for the public good* . . . ." Enacted by Act of Feb. 18, 1929, ch. 34, § 1, 1929 N.C. Sess. Laws 28, *remains in effect* with minor changes N.C. Gen. Stat. § 35-36 (1984).

"It is hereby declared to be the policy of the state to prevent the procreation and increase in number of feebleminded and insane persons, idiots, imbeciles, moral degenerates and sexual perverts, likely to become a menace to society or wards of the state. The provisions of this act are to be liberally construed to accomplish this purpose." Enacted by Act of May 22, 1929, No. 281, § 1, 1929 Mich. Pub. Acts 689, 689-90, *as amended by* Act of Apr. 30, 1962, No. 106, § 1, 1962 Mich. Pub. Acts 95, 96, repealed by Act of Aug. 6, 1974, No. 258, § 1106(a), 1974 Mich. Pub. Acts 911, 993-94.

Department of health and environmental control may grant upon petition an order to sterilize "such inmate [who] is . . . idiotic, imbecile, feeble-minded . . . and [that] by the laws of heredity is or would be the probable potential parent of *socially inadequate offspring* likewise afflicted . . . ." Enacted by Act of May 17, 1935, No. 304, § 1, 1935 S.C. Acts 428, 429, *remains in effect* S.C. Code Ann. § 44-47-50(a) (1976).